Under the peculiar circumstances of this case, which is without a precedent, there seems to be no remedy to the plaintiff but to make the order he asks.

Anxious, however, to avoid, if it may be, the carrying of this order into effect, and allow the corporation time to elect officers and itself to levy and collect the tax, the execution of the order will be suspended for the space of three months, and the right reserved to suspend it longer if a showing be made to the court, or either of its judges, that an election of municipal officers, as provided by the law and charter, has been duly held, and that the proper body has levied and is proceeding, according to law, to collect the taxes necessary to satisfy the plaintiff's judgment. Ordered accordingly.

TREAT and KREKEL, JJ., concurred.

United States Circuit Court, Southern District of Georgia.

IREDELL P. DAVIS *v.* ELIZABETH HATCHER, EXECUTRIX OF SAMUEL J. HATCHER.

The statutes of limitations of the state of Georgia passed during the war, however defective they may have been in point of original authority, were ratified by the Constitution of 1868,[1] and are valid.

A surety is discharged where the creditor after notice and request, has been guilty of a delay which amounts to gross negligence, and by his negligence the surety has lost his security or indemnity. But the omission of the creditor to sue a principal residing in another state could not, under any circumstances, as between him and the surety, make him chargeable with gross negligence.

THIS was an action of *assumpsit* commenced on the 31st of December 1869, on a promissory note, dated at Columbus, Ga., December 30th 1858, given by Reuben Allison as principal and Samuel J. Hatcher as surety, to P. J. Phillips, executor of H. H. Lowe, or bearer, for the sum of $1125, payable on the 1st of

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[1] The Constitution of 1868 is the present Constitution of Georgia, ordained and adopted by the Georgia Convention assembled in pursuance of the Reconstruction Acts of Congress; ratified by the people of Georgia at an election held in April 1868, under order from Major-General Meade. Accepted by the Congress of the United States on the 25th June 1868, with certain conditions: Public Laws of United States 1867–8, pp. 73, 74; and assented to by the General Assembly of Georgia on the 21st day of July 1868.—ED. AM. LAW REG.

January 1860, at the agency of the Bank of Savannah, in Columbus, with interest from date if not punctually paid. The surety endorsed a waiver of protest at the maturity of the note.

There was a verdict for plaintiff and motion for new trial.

BRADLEY, Circuit J.—The action was brought by Davis, as bearer, against the defendant as executrix of the surety. It is apparent that it was not brought for nearly ten years after the note became due, and the statute of limitations for such demands in Georgia is six years. The principal question in the case is, whether the laws and ordinances passed since the note became due have prevented the operation of the statute upon the cause of action arising thereon. The case was tried in December last, and the judge presiding ruled that the statute of limitations had been suspended so as to save the action. By an act of the legislature of Georgia passed in December 1860, the several statutes of limitation were suspended for one year. The Ordinance of Secession was passed January 19th 1861, and a new constitution was adopted in March and ratified in July following. By an act passed December 14th 1861, the statutes of limitation then in force were suspended during the then existing war, and where the statute had commenced to run, it was suspended until peace should be declared. After the war the convention of the people of Georgia, assembled by the provisional governor, in pursuance of President Johnson's proclamation of June 17th 1865, met at Milledgeville, and on the 31st day of October 1865, passed an ordinance which, amongst other things, ordained that the statutes of limitation in all cases, civil and criminal, should be suspended from the 19th of January 1861, until civil government should be fully restored, or the legislature should otherwise direct. Besides a constitution of the state, other ordinances were passed by said convention in the form of laws, which were observed as such for several years. By the third section of article eleven of the Constitution of 1868, adopted by the convention assembled under the reconstruction acts of Congress, it was declared, amongst other things, "that all acts passed by any legislative body, sitting in this state as such, since the 19th day of January 1861, except such as were inconsistent with the Constitution of the United States, or this constitution, or as may have been passed in aid of the late rebellion," &c., should be of force in this state, but that

the General Assembly might alter or repeal the same, if not otherwise prohibited by the constitution. By the fifth section of the same article it was declared that all rights, privileges, and immunities which might have vested in or accrued to any person or persons under any act of any legislative body, sitting as such, or any decree, judgment, or order of any court sitting in this state under the laws then of force and operation therein and recognised by the people as a court of competent jurisdiction since the 19th of January 1861, should be held inviolate, unless attacked for fraud or otherwise declared invalid by or according to this constitution. The General Assembly established under this constitution, by an act passed March 16th 1869, declared that all acts of the legislature of this state, and all ordinances of the conventions of 1865 and 1868, which have the force and effect of law, which are retroactive in their character relative to the statutes of limitation, should be held to be null and void, in all cases in which the statute had fully run, before the passage of said retroactive legislation. This review of the legislation which has taken place, leads to the following conclusions: 1st. That the suspensory laws of 1861 and 1865, however defective they may have been in point of original authority, were ratified by the Constitution of 1868. 2d. That the Act of 1869 does not control or modify their operation, except as to cases in which the statute had fully run, before their passage "respectively." These points being established, the case does not present the slightest difficulty.

The ordinary statute in this case did not commence to run till January 4th 1860, and would not have fully run till January 3d 1866. It was suspended therefore, both by the Act of 1861, during the whole continuance of the war, and by the ordinance of 1865, from the 19th of January 1861, until civil government should be fully restored. Deduct this period of suspension from the time that elapsed before the commencement of this suit, and it will be found to have commenced within six years from the maturity of the note. I have been referred to the case of *Calhoun* v. *Kellogg*, 41 Ga. 231, to show that the Supreme Court of this state has held that the ordinance of 1865 was not in legal operation until the Constitution of 1868 made it so. I do not so understand the case. The court did decide, however, that if the statute had fully run before the passage of the ordinance of 1865,

though not until after the Act of 1861, the cause of action was not revived. If that decison should be regarded as decisive of the law of Georgia, still it does not affect this case. But with the highest respect for the court by which it was made, it seems to me that the dissenting views of Justice WARNER, are founded on the better reason, and that they are sustained by the previous decision of the same court in *Brian* v. *Banks*, 38 Ga. 300. That however, is a question of local law which it does not become necessary to decide.

Another point was made on the trial which it becomes necessary for me to notice. It arises under the statute of this state, passed in 1826, and re-enacted in 1831, by which the security or endorser of any promissory note or other instrument, after the same has become due, may require the holder to proceed to collect the same, and if he does not proceed to do so within three months after such notice or requisition, the endorser or surety shall become no longer liable. Such a notice was given in this case in December 1861, or January 1862, by the executrix to the payee of the note, who then held the same. But it is admitted that the principal resided and still resides in Alabama. By repeated decisions of the courts of this state, it has been held, that if the principal does not reside in this state, the holder of the note is not bound by the law. He cannot be compelled to go out of the state to sue the principal. Those decisions are binding on this court. It was also contended on the trial, and made a point here, that on general principles of law, if the surety require the creditor to collect the money of the principal, and he neglects doing so when he can, and the principal afterwards becomes insolvent, the surety will be discharged. I do not so understand the law. The contract between the parties is this: "If A. does not pay the debt, I, the surety, will pay it." To make it read, "if A. does not pay the debt, I will pay it, if you prosecute A. when I request it," is to introduce a new term into the contract. Who is guilty of laches, the creditor or the surety after the principal fails to pay the debt at maturity? Is it not the duty of the surety by his contract to pay it, and not subject the creditor to the necessity of bringing a suit? There may be equitable considerations which would make it extremely hard and unjust for the creditor to refuse to prosecute the principal. But when they arise, they belong strictly to equity, and a court of equity is

the proper tribunal to consider them. Mr. Parsons, in his work on Contracts, after reviewing some of the cases, says: "A surety is discharged where the creditor, after notice and request, has been guilty of a delay which amounts to gross negligence, and by his negligence the surety has lost his security or indemnity." (Vol. 2, p. 25, 5th Ed.) How can a surety be said to have lost his security by the negligence of the creditor to sue, when by paying the debt himself, as was his duty to do, he could at any moment have instituted suit against the principal? In this case the omission of the creditor to sue a principal residing in another state could not, under any circumstances, as between him and the surety, make him chargeable with gross negligence. The motion for a new trial is refused.

United States District Court, Western District of Wisconsin.

MATTER OF W. S. STEVENS, BANKRUPT.[1]

It is the duty of a court of bankruptcy to see that the property to which a bankrupt is entitled is secured to him, as much as to see that he surrenders the balance to his creditors.

Personal property exempt by the laws of the state where the bankrupt resides and where the petition is filed, will be protected wherever it may be actually situated.

Personal property of a debtor residing in Wisconsin was attached in Illinois. Pending the attachment the debtor filed a petition in bankruptcy in Wisconsin. The property was exempt by the laws of Wisconsin. *Held:*

1. That the property was exempt under the Bankrupt Act and the attachment dissolved.

2. The Bankruptcy Court will not consider whether the property was exempt under the laws of Illinois.

3. The officer in possession of the property under the attachment writ cannot retain the property until his fees are paid. His only remedy is by application to the court to be paid out of funds in the hands of the assignee.

THIS was a case of voluntary bankruptcy. The petition was filed September 30th 1870, and at the request of the bankrupt, a provisional assignee was appointed of his estate. A portion of the property at the time (a span of horses, wagon and harness)

[1] We are indebted to Josiah H. Bissell, official reporter, for the following opinion. Mr. Bissell's Reports (the first volume of which is now in press) comprise the decisions in the Circuit and District Courts within the 7th Judicial Circuit, since 6 McLean (1855) down to the present time.